

R. O. requests review of Administrative Law Judge Sessions' summary dismissal of Mr. O.' claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

### **BACKGROUND AND ISSUE PRESENTED**

On November 9, 2004, Mr. O. filed an application with the Commission to compel ADS and its workers' compensation insurance carriers, Hartford and Lumbermen's,<sup>1</sup> to pay medical expenses for treatment of a back injury Mr. O. allegedly suffered while working for ADS between February and July 2003.

On December 22, 2004, Lumbermen's moved to dismiss Mr. O.'s claim on the grounds: 1) Mr. O. had failed to give his employer timely notice of the alleged accident; and 2) Lumbermen's was not ADS's insurance carrier at the time Mr. O.'s occupational disease claim arose. Mr. O. responded to Lumbermen's motion to dismiss by asserting that he had immediately notified his supervisor of his injury. Mr. O. also pointed out that he was claiming workers' compensation benefits for a back injury caused by repetitive trauma and that Lumbermen's was ADS's insurer during part of the time that the repetitive trauma occurred. On January 5, 2005, Judge Sessions issued an order denying Lumbermen's motion to dismiss on the grounds that an evidentiary hearing was necessary to resolve disputed facts.

On January 11, 2005, Hartford filed a motion to dismiss Mr. O.'s claim. Hartford argued that 1) Mr. O.'s application lacked supporting medical documentation and 2) Mr. O. had failed to timely report his alleged accident. Even though Judge Sessions previously had declined to grant Lumbermen's motion to dismiss Mr. O.' claim for failure to give timely notice, Judge Sessions granted Hartford's identical motion to dismiss for failure to timely report the accident.

Mr. O. now asks the Appeals Board to reverse Judge Sessions' decision on the grounds that factual disputes regarding the nature and timing of the notice of injury that Mr. O. gave to his employer preclude summary dismissal of his claim.

### **DISCUSSION**

Section 34A-2-407(2) of the Utah Workers' Compensation Act provides that "[a]ny employee who fails to notify the employee's employer or the division within 180 days of an injury is barred for any claim of benefits arising from the injury." Thus, Mr. O.'s ability to pursue his claim turns on whether he notified his employer within 180 days of the alleged accident.

So far in this proceeding, the only information on this point is the notation on the Employer's First Report of Injury that the employer received notice on January 24, 2004, and Mr. O.'s assertion

that he personally notified his supervisor of his injury shortly after the accident. This scant evidence does not resolve the issue one way or the other. To the contrary, it indicates a dispute of a material fact that must be resolved through a additional evidentiary proceedings. Under these circumstances, summary dismissal of Mr. O.'s application is inappropriate.

The Appeals Board notes Hartford's request that the Board address Hartford's argument that Mr. O. has not submitted documentation of medical causation. Because Judge Sessions did not rule on that issue, the Appeals Board declines to address it now in this review proceeding. Hartford may raise the issue in proceedings on remand to be conducted by the Adjudication Division.

### **ORDER**

The Appeals Board grants Mr. O.'s motion for review, sets aside Judge Sessions' decision of February 1, 2005, and remands this matter to the Adjudication Division for such additional proceedings as are appropriate to adjudicate Mr. O.'s claim. It is so ordered.

Dated this 25<sup>TH</sup> day of August, 2005.

Colleen S. Colton, Chair  
Patricia S. Drawe  
Joseph E. Hatch

1. The Appeals Board notes Ms. C.'s assertion that another co-worker, Jon Sargent, was also guilty of "cross-over" violations but received no discipline. However, the record does not establish the circumstances of Mr. Sargent's conduct. Without that information, the Appeals Board cannot assume that Mr. Sargent's conduct was comparable to Ms. C.'s conduct.